Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1791

FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES,
(DIMITRI T. SKOURAS, ETC., Real Party in Interest)
Respondent.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Respondent Dimitri T. Skouras respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Order of the California Court of Appeal, Second Appellate District, entered in this proceeding on March 5, 1979.

QUESTION PRESENTED

Did the California Court of Appeal err in determining that Petitioner, a national bank, had waived the provisions of 12 U.S.C. Section 94, where (a) Petitioner's motion to quash service of process based upon 12 U.S.C. § 94 was untimely under state law, and (b) Petitioner had engaged in tortious conduct within and with respect to the State of California in its capacity as the controlling shareholder of a California corporation.

STATEMENT OF THE CASE

Certain matters highly germane to this case are not to be found in Petitioner's Statement of The Case. Accordingly, Respondent submits the following as his Statement of The Case.

First Southern Capital Corporation, formerly California Growth Capital, Inc. (hereinafter collectively referred to as "FSCC") is a Small Business Investment Company organized and existing under the laws of the State of California. Respondent Dimitri T. Skouras ("Skouras"), a California resident, is the trustee of a California trust which holds a minority of the shares of FSCC.

Petitioner First National Bank of Commerce ("FNB") is a nationally chartered bank with its headquarters in Louisiana.

In about 1971, FNB became interested in acquiring an interest in FSCC. In February of that year, two FNB representatives flew to Los Angeles to negotiate with FSCC. Two years of negotiations ensued, during which time representatives of FNB made numerous trips to California. In addition, FNB sent its appraiser to California to examine and appraise the assets of FSCC.

The closing of the Purchase and Sale Agreement pursuant to which FNB acquired its controlling shares of FSCC took place at FSCC's principal office located in Los Angeles, California, on March 30, 1973. The Bank was represented at the closing by its Executive Vice-President and two other employees. Pursuant to, and in connection with, the Purchase and Sale Agreement, an entity named De Anza Land and Leisure Corporation and FNB entered into a Security Agreement under which FNB received a security interest in two parcels of real property located within the State of California.

In 1977, FNB sold its controlling interest in FSCC to an entity named Crabtree Investments, Inc., for a premium above the market price and book value of those holdings. In conjunction with this sale, the FSCC Board members controlled

by FNB resigned and were replaced by persons chosen by Crabtree Investments, Inc. Shortly thereafter, the size of the Board of FSCC was reduced so that Skouras no longer has sufficient votes to elect any members of the Board.

On August 10, 1978, Skouras filed a lawsuit in the California Superior Court, County of Los Angeles, against FNB and others. The Complaint alleged, *inter alia,* that FNB had breached its fiduciary duty as controlling shareholder by: (1) not sharing with Skouras and other minority shareholders the premium it received for the sale of control and for director resignations; and (2) selling control to an entity it should have known would reduce the size of the Board of FSCC so as to preclude Skouras from electing anyone to that Board.

Pursuant to a written agreement between counsel, FNB was given an extension of its time to respond to the Complaint to October 16, 1978. FNB did not respond within this time period, however, but instead filed an untimely response on October 19, 1978, at which time it filed a motion to quash service of process on the ground that, under 12 U.S.C. § 94, it could be sued only in Louisiana.

Skouras opposed the motion on the ground that FNB had waived the provisions of 12 U.S.C. § 94 in two separate and independent respects. First, he argued that FNB waived the protection of 12 U.S.C. § 94 by virtue of its extensive and tortious conduct within and with respect to the State of California in connection with its interest in FSCC. Second, Skouras contended that FNB waived the protection of 12 U.S.C. § 94 by failing to invoke that statute before its time to respond to the Complaint had expired, as required by California law.

The Superior Court denied FNB's motion by Order dated February 6, 1979. FNB thereupon filed a Petition for a Writ of Mandate, which Petition was denied by the California Court of Appeal, Second Appellate District, by Order dated March 5, 1979. The California Supreme Court denied a Petition for Hearing on April 12, 1979.

REASONS FOR DENYING THE WRIT

1. The Decision Below Rests On Adequate State Grounds

Petitioner purported to assert the provisions of 12 U.S.C. § 94 by filing a motion to quash service of process pursuant to *California Code of Civil Procedure* § 418.10. Section 418.10 provides that a defendant may make a motion to quash service "on or before the last day of his time to plead or within such further time as the court may for good cause allow. . . ." Petitioner's motion was untimely, as it was filed after its time to respond to the Complaint had expired. No extension of time was requested of the court and none was granted.

Respondent argued in the courts below that Petitioner's motion should be denied because it was untimely. By failing to assert the provisions of 12 U.S.C. § 94 within the time allowed by California law, Petitioner had waived those provisions.

As the Court of Appeal wrote no opinion, the decision below does not indicate whether or not it was based on this ground. For present purposes, then, it must be assumed that it was. *Durley v. Mayo,* 351 U.S. 277, 100 L.Ed. 1178 (1956); *Lynch v. People of New York,* 293 U.S. 52, 79 L.Ed. 191 (1934).

Furthermore, this nonfederal ground is adequate to sustain the denial of Petitioner's claim. The time requirement is expressly set forth in the procedural statute under which Petitioner made its motion, and is reasonable on its face. This Court has already held that 12 U.S.C. § 94 may be waived by untimely assertion, *First National Bank v. Morgan,* 132 U.S. 141, 33 L.Ed. 282 (1889), and that, in general, venue provisions are deemed waived if not asserted within the time alloted to plead. *Commercial Casualty Insurance Co. v. Consolidated Stone Co.,* 278 U.S. 177, 179-80, 73 L.Ed. 252 (1929).

Since the state court's decision can be sustained on the basis of an adequate nonfederal ground, the present Petition should be denied.

2. None Of The Factors Justifying The Exercise Of Certiorari Jurisdiction Is Present In This Case.

In several recent decisions, this Court has indicated that 12 U.S.C. § 94 may be waived by conduct, and has remanded to the state court for a determination of the waiver issue. *See National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.,* 425 U.S. 460, 48 L.Ed.2d 92 (1976); *Michigan National Bank v. Robertson,* 372 U.S. 591, 9 L.Ed.2d 961 (1963).

In this case, the state court, if it addressed the question at all, merely held that Petitioner's conduct within and with respect to the State of California, *in its capacity as a controlling shareholder of a California corporation,* gave rise to such a waiver.

This is not a holding on an important question of law, but rather, a resolution of a factual issue. Moreover, this factual issue is unlikely to recur, since the Petitioner was acting not in its capacity as a bank but instead in its capacity as the controlling shareholder of a corporation.

Petitioner suggests that the court below held that Petitioner had waived the protection of section 94 simply by doing business in California. It is clear that the court below held no such thing. Respondent never contended that Petitioner's participation in the national banking system was enough to constitute a waiver of section 94. Moreover, such a contention would have been futile, since the lower court had before it a recent decision by the California Court of Appeal in another case *sustaining* a claim by this very Petitioner under section 94. *See Kaiser Aetna v. Deal,* 86 C.A.3d 896, 899, 150 Cal.Rptr. 615 (1978). Clearly, then, the court below did not rest its decision on Petitioner's participation in the national banking system, but rather on the unique facts of this case.

Similarly unfounded is Petitioner's suggestion that this case is but one example of recent California decisions which have equated doing business with a waiver of section 94. For instance, in *Michigan National Bank v. Superior Court,* 23 C.A.3d 1, 99 Cal.Rptr. 823 (1972), cited by Petitioner, the Court of Appeal analyzed personal jurisdiction and waiver of section 94 as two distinct issues. The court rejected the contention that section 94 was waived solely because defendant had conducted enough business in California to be deemed to have appointed the Secretary of State as its agent for service of process.

Moreover, there is no conflict between the decision below and the decisions of the Circuit Courts of Appeals. None of the federal cases cited by Petitioner involved a claim that a national bank had breached a fiduciary duty as a controlling shareholder of a corporation. Rather, they involved banking activity. *See, e.g., Northside Iron and Metal Co. v. Dobson and Johnson, Inc.,* 480 F.2d 798 (5th Cir. 1973) (dispute concerning construction financing).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Dated: August 23, 1979.

Respectfully submitted,

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